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Supreme Court, U.S.
FILED
07-528 OCT 18 2007
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No. (1)

IN THE

Supreme Court of the United States

WILFREDO UMPIERRE-HERNANDEZ,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether plain error review of unpreserved Booker claims properly ignores Sixth Amendment considerations and looks only at the failure to treat the sentencing guidelines as advisory, and whether a district court's sentence can be upheld as reasonable where the court did not apply the standard of review set forth in Booker.

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding in the United States Court of Appeals for the First Circuit are:

Lorenzo Munoz-Franco,

Dr. Francisco Sanchez-Aran,

Ariel Gutierrez-Rodriguez,

Wilfredo Umpierre-Hernandez, and

The United States.

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The opinion of the United States Court of Appeals for the First Circuit is reported at 487 F.3d 25 (1st Cir. 2007), and is attached as Appendix "A". A copy of the Order denying rehearing is attached as Appendix "B".

JURISDICTION

The date on which the United States Court of Appeals for the First Circuit decided this case was May 22, 2007. A timely petition for panel rehearing or rehearing en banc was denied by the First Circuit on July 20, 2007. Judgment was issued as a mandate on July 27, 2007. The petition is timely filed pursuant to S. Ct. Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI, U.S. Constitution: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .."

Amendment V, U.S. Constitution: "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . .."

18 U.S.C. § 1344
18 U.S.C. § 371
18 U.S.C. § 657
18 U.S.C. § 3553

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

The original indictment in this case was brought on November 22, 1995, alleging acts as early as 1980 or before. The indictment was changed several times thereafter. Trial began with jury selection in November 2000, and concluded in May 2002, with jury verdicts of guilty against four defendants – Lorenzo Munoz-Franco; Dr. Francisco Sanchez-Aran; Ariel Gutierrez-Rodriguez; and petitioner Wilfredo Umpierre-Hernandez – on charges of bank fraud (18 U.S.C. § 1344), conspiracy (18 U.S.C. § 371) and misapplication of bank funds (18 U.S.C. § 657). Sentencing proceedings did not begin until almost a year and a half later and took several months, concluding on February 12, 2004. Although sentencing proceeded before both Blakely v. Washington, 542 U.S. 296 (2004), and Booker v. United States, 543 U.S. 220 (2005), the defendants raised numerous objections to the application of the federal sentencing guidelines, including arguments based on Apprendi v. New Jersey, 530 U.S. 466 (2000). These objections were overruled by the District Court, which treated the guidelines as mandatory and computed sentences based largely on the mathematics of the court's determination of a loss amount. The court sentenced Munoz-Franco and Sanchez-Aran to guideline sentences of 46 months imprisonment, Gutierrez to 37 months imprisonment, and Umpierre to 24 months imprisonment (and sentenced the first three defendants as well to a concurrent pre-guidelines

sentence on misapplication of 60 months, and Umpierre of 24 months).

The defendants, including Petitioner, timely filed appeals with the First Circuit, including arguments about Booker errors at sentencing. Oral Argument occurred on December 6, 2006. The First Circuit affirmed the convictions in a 97-page opinion on May 22, 2007, and in passing declined to review the sentencing process based upon First Circuit precedent established in United States v. Antonakopoulos, 399 F.3d 68 (1st Cir. 2005), whereby unpreserved Booker claims fall under plain error analysis which presumes the error did not materially affect the proceedings. The First Circuit commented: "thus we acknowledge only that appellants have preserved this issue for later review." United States v. Munoz-Franco, 487 F. 3d 25, 70 (1st Cir. 2007). The defendants sought panel rehearing and rehearing en banc, but the First Circuit denied these petitions on July 20, 2007. On August 1, 2007, the First Circuit granted a stay of the Court's mandate pending Supreme Court review.

II. STATEMENT OF THE FACTS

A. Overview

Caguas Central Federal Savings & Loan ("Caguas") operated as one of the largest thrifts in Puerto Rico until it was closed by federal regulators in May 1990. Lorenzo Munoz-Franco was President and Dr. Francisco Sanchez-Aran was Executive Vice-President of Caguas

throughout the 1980s. Ariel Gutierrez and his brother Enrique Gutierrez owned certain companies, including Transglobe Corporation and Modules Manufacturing Inc., which built and installed modular homes. Wilfredo Umpierre was an employee of these companies. Beginning in the 1970s and up into 1984, Gutierrez' companies received substantial construction loans from Caguas for projects that the companies were developing. After 1984 and up through 1986, Gutierrez' companies acted as contractors for other developers who borrowed monies from Caguas. By 1987, the Gutierrez brothers and Caguas no longer had any lending relationships and, in fact, the parties sued one another. By this time, other developers had assumed Gutierrez-related projects and had continued receiving funding from Caguas on these projects. The Gutierrez manufacturing companies also were sold by this time, and the new owners likewise continued receiving funding from Caguas.

By 1990, the loans on many of the projects with which the Gutierrez brothers had been previously associated were millions of dollars in arrears. The manufacturing companies' debt to Caguas had grown from $6 million in 1986 to $40 million in 1990. At the time it was closed, Caguas had numerous other non-performing loans as well, including more than $20 million in debt relating to another developer, Francisco Mirandes.

B. Indictments, Jury Verdict And Sentencing

The original indictment in November, 1995, identified only a few loans and associated the Gutierrez-related loans and the Mirandes-related loans together in the conspiracy and bank fraud charges. By 1998, the indictment had been changed three times. The third superseding indictment, on which the case was tried, separates into different counts the Gutierrez-related loans and the Mirandes-related loans, mentioning at least twelve (12) loans with varying alleged debts in the Gutierrez charges and fourteen (14) loans with varying debts in the Mirandes charges. The third superseding indictment generally alleged that Gutierrez' companies obtained loans from Caguas in excess of $20 million; that a borrower who assumed some Gutierrez projects owed Caguas $16 million in 1989; and that as a result of the Gutierrez-related conspiracy to defraud, Caguas sustained a loss of approximately $26 million, which contributed substantially to its failure. The third superseding indictment also alleged that, in 1990, Mirandes' companies owed Caguas in excess of $20 million and that, as a result of the Mirandes-related conspiracy to defraud, Caguas sustained a loss of approximately $23 million, which contributed substantially to its failure.

Trial began with testimony in January 2001. The case was submitted to the jury for deliberations in May 2002. No jury interrogatories or special verdict form were utilized. The verdicts of guilty were general verdicts. The jury made no finding as to loss.

Sentencing proceedings began in the Fall 2003. Although the Government originally proceeded on an actual loss theory, it abandoned that position after it was learned that the trial exhibit on which the Government relied for loss numbers, Ex. 40, a purported summary of Caguas loans prepared by Santander Bank, was false. The records custodian whose affidavit was used to admit the exhibit recanted that affidavit, and the Government conceded that the loss figures therein were unreliable and unauthenticated. The Government then urged an intended loss analysis, which the trial court adopted.

The trial court rendered its sentences on February 12, 2004. The sentences on the conspiracy and bank fraud charges proceeded using mandatory sentencing guidelines. All defendants started at the same base offense level for fraud, a base level of six, which set a sentencing range of zero to six months imprisonment. As to Umpierre and Gutierrez, the court found a loss of between $2 million and $5 million, and added 10 levels. After making other adjustments, the court sentenced Umpierre at a level 16 and Gutierrez at a level 19. As to the banker defendants, the court found a greater loss, added 11 levels and, after other adjustments, sentenced the bankers at a level 21. The court denied downward and upward departures.

III. REASONS FOR GRANTING THE WRIT

A. The First Circuit Misreads Booker And Misapplies The "Substantial Rights" Prong Of Olano's "Plain Error" Analysis

The First Circuit erred in its application of the plain error doctrine for unpreserved Booker errors in finding that the District Court proceedings did not affect defendant's "substantial rights," where defendant was sentenced to an enhanced term, in excess of what was authorized by the jury, based solely upon judge-found facts, using mandatory guidelines, and absent consideration of Section 3553 mitigating factors.

In United States v. Olano, 507 U.S. 725 (1993), this Court clarified what plain error means and found that there were several limitations on appellate authority under Rule 52(b) of the Federal Rules of Criminal Procedure. Specifically, there must be an (1) error (2) that is plain or obvious, (3) that has affected substantial rights, and (4) would impair confidence in the justice of the proceedings. Id. at 732-736. As to the third prong, this Court added, "in most cases it means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings." Id. at 734. In United States v. Dominguez-Benitez, 542 U.S. 74, 76 (2004), this Court explained that the effect on the outcome means a defendant must show a reasonable probability that, but for the error, things would have been different.

The First Circuit, and other courts, have incorrectly found that an unconstitutionally enhanced sentence based solely upon judge-found facts not submitted to the jury, does not satisfy Olano's "substantial rights" prong. See, e.g., United States v. Antonakopoulos, 399 F.3d 68, 79 (1st Cir. 2005); United States v. Mares, 402 F.3d 511, 521-22 (5th Cir. 2005); United States v. Paladino, 401 F.3d 471, 483-84 (7th Cir. 2005) (adopting a limited remand approach); United States v. Rodriguez, 398 F.3d 1291, 1301 (11th Cir. 2005). These courts, including the First Circuit in the underlying matter, have erred in their application of Olano's "plain error" analysis.

The First Circuit, and other courts, erroneously hold that, "in applying the third prong [of Olano], we ask whether there is a reasonable probability of a different result if the guidelines had been applied in an advisory instead of binding fashion by the sentencing judge in th[e] case." Rodriguez, 398 F.3d at 1301. See also Antonakopoulos, 399 F.3d at 79. This approach to determining whether "substantial rights" have been affected in pre-Booker sentencing proceedings is incorrect. The First Circuit, and other courts who engage in similar analysis, misapply the "prejudicial" aspect of the "substantial rights" prong, and treat Sixth Amendment claims under Booker as if defendants were only wronged by the mandatory nature of the guidelines, and not by the underlying Sixth Amendment violation.

When reviewing a sentence under the Sentencing Guidelines, one question that should guide the court "is whether the district court could have imposed the sentence it did without exceeding the relevant Sixth Amendment limitation." United States v. Hughes, 401 F.3d 540, 551 (4th Cir. 2005). The proper finding is that a sentencing determination that increases a defendant's sentence "beyond that which was supported by the jury verdict and [the defendant's] criminal history" is a violation of the Sixth Amendment and affects defendant's substantial rights. United States v. Oliver, 397 F.3d 369, 380 (6th Cir. 2005). See also United States v. Davis, 407 F.3d 162, 164 (3d Cir. 2005) ("Mandatory enhancement of a sentence in violation of the Sixth Amendment is prejudicial and affects the substantial rights of the defendant."); Hughes, 401 F.3d at 548-549. See generally Cunningham vs. California, 549 U.S. __, 127 S. Ct. 856 (2007).

Other Circuits have taken positions inconsistent with how the First Circuit handles plain error review of Booker errors. The Second Circuit remands all cases of claimed Booker error to the trial court to decide whether to resentence. See, e.g., United States v. Crosby, 397 F.3d 103 (2d Cir. 2005). The Ninth Circuit finds plain error per se when judicial fact-finding elevates a sentence above what would be contained in the jury verdict. See, e.g., United States v. Ameline, 400 F.3d 1073 (9th Cir. 2005) (adopting approach in Crosby). The Sixth Circuit and the Fourth Circuit appear to conduct reviews akin to what the Ninth Circuit does. See, e.g., Oliver, 397 F.3d at 380-81; Hughes, 401 F.3d at 548-49.

i. The First Circuit And Other Courts Have Misapplied The "Prejudicial" Aspect Of Olano's "Substantial Rights" Prong By Focusing On What Would Have Happened To The Defendant Under Advisory Guidelines As Opposed To What Did Happen To The Defendant Below

Petitioner was prejudiced by the District Court's sentencing, where there were enhancements based solely upon judge-found facts not submitted to the jury, and where these enhancements exceeded the sentence authorized by the jury.

When determining whether a defendant has been prejudiced by an error below, "the proper focus is on what actually happened as a result of error . . .." Hughes, 401 F.3d at 551. Still, the First, Fifth, and Eleventh Circuits attempt to divine what the district court would have done had the court known the Sentencing Guidelines were merely advisory.[1] See Antonakopoulos, 399 F.3d at 79-80; Mares, 402 F.3d at 521-22; Rodriguez, 398 F.3d at 1301. The Second and Seventh Circuits go as far as engaging in a limited remand so that the District Court may determine whether it would have given the same sentence under an advisory

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[1] Such an approach is improper, not only for the stated reason that the focus should be on how defendant was prejudiced below, but also because defendant's sentence would continue to violate defendant's Sixth Amendment rights so long as the standard of review requires substantive "reasonableness," as opposed to a procedural review.

guidelines scheme. See Paladino, 401 F.3d at 483-84; Crosby, 397 F.3d at 118.

Petitioner's conviction was based on a general jury verdict. The verdict did not clearly resolve facts to permit the trial court to enhance a guidelines sentence beyond a base level of the offenses. In particular, the jury made no findings as to loss. The trial court enhanced Petitioner's and the other defendants' sentences, inter alia, based on the court's assessment of loss and without considering Section 3553 mitigation factors. A sentence enhancement based solely upon judge-found facts violates a defendant's Sixth Amendment right to trial by jury when it exceeds that which was authorized by the jury or admitted by the defendant. Booker, 543 U.S. at 244 (holding that "[a]ny fact (other than prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."). See also Cunningham, 549 U.S. at __, 127 S. Ct. at 868.

When the District Court violated defendant's Sixth Amendment right to trial by jury by substituting judge-found facts to enhance the sentence, it affected defendant's "substantial rights." See Oliver, 397 F.3d at 379-80 (holding that a sentencing determination that increases a defendant's sentence "beyond that which was supported by the jury verdict and [defendant]'s criminal history" is a violation of the Sixth Amendment and affects the defendant's substantial

rights). Here, there is a reasonable probability that the sentence enhancements, viewed as mandatory by the trial court and applied without consideration of Section 3553 mitigating factors, affected the outcome of the proceedings, and thus prejudiced Petitioner.

ii. The First Circuit And Other Courts Erred In Identifying The Mandatory Nature Of The Guidelines As The Only Relevant Error For Determining Whether Defendant Had Been Prejudiced

A plain error review that looks at a Sixth Amendment violation focusing under Booker only on whether the District Court Judge would have issued the same sentence under advisory guidelines, and ignoring violations of those rights reserved by the Sixth Amendment, is erroneous.

The Eleventh Circuit maintains that, in a post-Booker appeal where defendant claims that his Sixth Amendment rights have been violated, the court "should redefine the error as a failure to treat the guidelines as advisory." Hughes, 401 F.3d at 552 (citing Rodriguez, 398 F.3d at 1303). However, as the Fourth Circuit has noted, this approach is incorrect because "there are two "potential errors in a sentence imposed pursuant to the pre-Booker mandatory guidelines regime." Hughes, 401 F.3d at 552. One involves errors under a mandatory scheme that do not give rise to a Sixth Amendment violation; the other involves violation of rights reserved under the Sixth Amendment. Id.

The first sort of post-Booker claim does not implicate the Sixth Amendment. This first category consists of appeals based solely on the fact that the defendant was sentenced under a mandatory guidelines scheme that was later invalidated. Defendants under the first category cannot claim, under the Sixth Amendment, that they have been sentenced to a term in excess of what the jury authorized.

The second sort of post-Booker claim does rest on the rights reserved under the Sixth Amendment. These claims will involve defendants who, due to the judge's independent determination of facts, have been sentenced to a term in excess of what was authorized by the jury, and thus have been deprived of their right to trial by jury.

By treating every post-Booker appeal the same, those courts in disagreement with the Second, Ninth, Fourth, Sixth, and Third Circuits shut their eyes to the Sixth Amendment violation while simultaneously telling the defendant that he must demonstrate how he has been prejudiced. "Any inquiry into whether a Sixth Amendment error affected a defendant's substantial rights must take as a given the Sixth Amendment limitation that the district court improperly exceeded." Hughes, 401 F.3d at 550.

The Sixth Amendment right as identified in Apprendi, Blakely, and Booker, and clarified in Cunningham, is that a sentence enhancement,

based solely upon judge-found facts, that exceeds the maximum sentence authorized by the jury is improper. While the mandatory nature of the sentencing guidelines may have led to the Sixth Amendment violation, the mandatory nature of the guidelines themselves was not a violation of defendant's Sixth Amendment rights. Rather, sentence enhancements, beyond what the jury authorized, based solely on judge-found facts represent the unconstitutional ailment; and rendering the Sentencing Guidelines advisory was merely the remedy. Thus, the plain error analysis of the First Circuit, as well as the Fifth, Seventh, and Eleventh Circuits, stops too soon and wrongly fixes on this Court's remedy and not on the constitutional defect.

Petitioner was sentenced to an enhanced term due to the independent judicial findings of the district court judge. These findings of fact were not made by the jury, and the sentence exceeded the maximum term authorized by the jury. The First Circuit's plain error review standard for unpreserved Booker errors prevented meaningful appellate review of a constitutional violation that affected Petitioner's "substantial rights" and prejudiced the result of the proceedings. The First Circuit's plain error review standard does not comport with Olano. Unless corrected by this Court, the First Circuit is likely to continue taking a wrong approach in plain error reviews in other sentencing appeals.

IV. DEFENDANT'S SENTENCE IS NOT REASONABLE, WHERE THE DISTRICT COURT DID NOT CONSIDER THE §3553(A) STANDARDS

Because Defendant's sentence was "plain error," the First Circuit should have remanded the case for resentencing. However, the sentence, as constituted, is also not "reasonable" under Booker's established standard of review. See Booker, 543 U.S. at 261-262.

Defendant's sentence was not "reasonable" where the District Court did not apply the standard of review set forth in Booker. "Booker's standard of review allows – indeed, requires – district judges to consider all of the factors listed in § 3553(a) and to apply them to the individual defendants before them." Rita v. United States, 551 U.S. __, 127 S. Ct. 2456, 2473 (2007) (Stevens concurring opinion). See also Booker, 543 U.S. at 264; Oliver, 397 F.3d at 381 (stating that "[§] 3553(a) includes a list of factors which federal courts must consider when determining the proper sentence post-Booker") (emphasis added). In the instant case, the district court did not consider § 3553(a) in its sentencing. Therefore, the First Circuit can not find that Defendant's sentence was "reasonable" under Booker's standard of review.

CONCLUSION

These are issues of great constitutional importance. They arise from the uncertainty among the circuits as to the appropriate application of Olano's "substantial rights" prong, as well as from the uncertainty over post-Booker review of

unpreserved Booker errors. We respectfully request that this Court end these uncertainties by granting review. The Petition for a Writ of Certiorari should be granted. In addition, Petitioner adopts the certiorari Petitions filed by Petitioner's Co-Defendants, Ariel Gutierrez, Lorenzo Munoz-Franco and Francisco Sanchez-Aran and urges certiorari be granted on the basis of the arguments therein as well.

Respectfully submitted,

October 18, 2007

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